

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARIA D. BACA

Claimant

VS.

KOCH-GLITSCH, LP

Respondent

AND

OLD REPUBLIC INSURANCE COMPANY

Insurance Carrier

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Docket No. 1,043,912

ORDER

Claimant appealed the May 20, 2009, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

Claimant alleges she injured her back and developed a hernia working for respondent in a series of accidents through her last day worked. In the May 20, 2009, Order, Judge Barnes denied claimant's request for benefits after finding that claimant had failed to provide respondent with timely notice of her accident as required by K.S.A. 44-520.

Claimant appealed the preliminary hearing Order to this Board but, although requested, did not file a brief setting forth her contentions. Respondent and its insurance carrier (respondent) request the Board to affirm the Judge's finding that claimant failed to provide timely notice. In addition, respondent contends claimant failed to prove that she sustained personal injury by accident arising out of and in the course of her employment with respondent.

Consequently, the issues on this appeal are:

1. Did claimant prove she either injured her back or developed a hernia from the work she performed for respondent?

2. If so, did claimant provide respondent with timely notice of her alleged accident or accidents as required by K.S.A. 44-520?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the undersigned Board Member finds:

In April 2007, respondent hired claimant to work as a machine operator. When she began working for respondent, claimant did not have any low back problems and she had never seen a doctor for her low back. Likewise, she had never experienced any abdominal hernias.

About the first week of July 2008, when approximately six months pregnant, claimant noticed pain in her groin when going up and down on a forklift that she operated.¹ Claimant testified at the April 2009 preliminary hearing she first noticed the hernia symptoms while she was stacking a heavy part on top of a pallet.² Claimant, however, did not mention the pallet incident at a February 2009 deposition when she was asked if there was any one event that caused her pain.³

Claimant initially testified at the preliminary hearing that she first reported the hernia symptoms to the safety coordinator, Stacy Davis, and then her lead person, Jason Burget.⁴ But when confronted with different testimony from her earlier deposition, claimant then testified at the preliminary hearing that on her way to the bathroom she ran into her supervisor, Troy Wright, who told her to report *it* to the lead person.⁵ In any event, claimant maintains no paperwork was prepared and, instead, she was told to be careful and ask for help whenever needed. In summary, claimant now contends she told Mr. Wright, Mr. Burget, and Ms. Davis about a specific injury at work putting material on a pallet.⁶ She also now contends she told them she experienced a lot of pain every time she lifted heavy items.

¹ P.H. Trans. at 7.

² *Id.*, at 8.

³ *Id.*, at 28.

⁴ *Id.*, at 9.

⁵ *Id.*, at 30.

⁶ *Id.*, at 30, 31.

Continuing to work, claimant's hernia symptoms increased. She testified, however, she did not feel any pain on her days off. Claimant further testified she could no longer tolerate the pain and her family physician, Dr. Patricia Bledsoe, took her off work in September 2008. At that time claimant was eight months pregnant. It appears the last day that claimant actually worked for respondent was September 3, 2008.

Meanwhile, in May 2008, claimant prepared paperwork for family medical leave due to her pregnancy. Later, in November 2008, claimant applied for short-term disability benefits. The claim form submitted for those benefits indicates claimant had an illness that was not work-related and a diagnosis of inguinal hernia.⁷ And that form appears to have been completed and signed by claimant's physician, Dr. Bledsoe.

Claimant gave birth in October 2008. While off work, claimant consulted Dr. Bledsoe, who referred claimant to Dr. Todd Brown. Dr. Brown confirmed claimant had a hernia and recommended surgery. In November 2008, claimant returned to work for respondent with restrictions prohibiting lifting more than 30 pounds and working more than 40 hours per week. She worked one day before respondent sent her for a physical examination by the company physician, Dr. Wilkinson.

Dr. Wilkinson examined claimant in early December 2008, diagnosed a hernia, and adjusted claimant's restrictions. Respondent did not permit claimant to return to work as it allegedly could not accommodate her restrictions. Consequently, on December 19, 2008, claimant's employment was terminated.

Claimant also seeks benefits for her lower back. Claimant contends her job regularly required her to lift items weighing up to 70 or 80 pounds and that she pushed and pulled on heavy dyes that weighed up to 600 pounds. She maintains those activities hurt her lower back.

Claimant maintains she told her supervisor, Troy Wright, about her low back symptoms in July 2008 but he was ill at the time and indicated he would prepare a report at a later time.⁸ Mr. Wright quit working for respondent at the end of July 2008 and claimant is unaware if he ever prepared a report concerning her back. Jim Harris replaced Mr. Wright and claimant contends she also advised him about her back symptoms and he provided her with lighter work, when possible.⁹ Claimant alleges she told Mr. Harris her back was hurting from lifting but that he did not prepare a report as he would laugh and say

⁷ *Id.*, Resp. Ex. 6.

⁸ *Id.*, at 15.

⁹ *Id.*, at 16.

he would prepare it later. She also testified that her lead person, Jason Burget, and her friends knew about her back problems she experienced at work.

Claimant's first language is Spanish but she is relatively fluent in English. There are some words, however, that she does not understand or cannot pronounce. Claimant acknowledged she understood that respondent requires workers to promptly report all injuries. But she maintains that is interpreted to mean workers have to report *accidents* and respondent did not consider her reports of pain an accident. She testified, in part:

- Q. And you knew that you had to promptly report all injuries to [respondent] at that time, correct?
- A. Yes, but they say we have to report accidents. I told them that I had a lot of -- I told them that I had a lot of pain, but they didn't consider that an accident.¹⁰

In February 2009, claimant was examined by Dr. C. Reiff Brown, an orthopedic surgeon. The history recorded by Dr. Brown was that claimant was lifting heavy objects when she had an onset of pain in her lumbosacral and gluteosacral areas and that she also developed pain in the right groin. The doctor opined that claimant needed to observe certain restrictions and have additional diagnostic studies and treatment, including a referral to an orthopedist who specializes in back disorders.

Respondent's company physician, Dr. Larry K. Wilkinson, examined claimant in early December 2008. In an April 2009 report that was introduced at the preliminary hearing, Dr. Wilkinson noted that the history claimant gave him was that she developed right thigh pain in her sixth month of pregnancy and had been diagnosed by Dr. Todd Brown with a right inguinal hernia. Dr. Wilkinson wrote that he was not given a history that the hernia was related to work but claimant did tell his nurse that "she was now concerned about an injury due to the hernia. . . ."¹¹ During the examination Dr. Wilkinson could not palpate an inguinal hernia but he did find a small umbilical hernia.

In addition, Dr. Wilkinson noted that inguinal, femoral, and umbilical hernias were congenital defects that become apparent because of increased abdominal pressure secondary to pregnancy or physical activities such as heavy lifting. And, in claimant's case, if the hernia had not developed due to her work before her last pregnancy, he believed the pregnancy was the most likely contributing factor. Dr. Wilkinson cautioned,

¹⁰ *Id.*, at 27.

¹¹ *Id.*, Resp. Ex. 1 at 1.

however, that a general surgeon's opinion be obtained before making a final decision regarding causation.

Claimant's testimony regarding notice is contradicted by a number of respondent's witnesses. Deanna Vulgamore, who is employed by respondent as a human resources administrator, testified at the preliminary hearing that claimant did not mention any hernia symptoms or back problems in May 2008 when they were preparing the family medical leave documents. Moreover, when Dr. Bledsoe recommended that claimant take off work in September 2008 due to a hernia, Ms. Vulgamore testified the hernia was attributed to claimant's pregnancy and it was never attributed to work.¹² Likewise, when Ms. Vulgamore spoke with claimant in November 2008 about returning to work, claimant allegedly did not mention that her hernia or back symptoms were related to work.

Safety coordinator Stacy Davis, who testified by deposition, also contradicted claimant's testimony. Ms. Davis initially testified that claimant never reported to her an injury or pain complaints.¹³ But Ms. Davis also testified she knew claimant was having pain and complaining of weakness and fatigue, but that claimant did not mention stomach pains.¹⁴ And, according to Ms. Davis, before claimant left work on maternity leave in September 2008, claimant never mentioned her back was hurting from work. In short, all Ms. Davis knew was that claimant was pregnant.

Mr. Burget, claimant's former lead person, similarly testified that claimant never mentioned to him between approximately February 2008 and September 2008 when she left work that she had been hurt on the job.¹⁵ And similarly, Troy Wright, one of claimant's former supervisors, denied that claimant reported to him that she was injured at work or that she wanted to file a workers compensation claim any time between February 2008 and July 2008, when he left respondent's employ.¹⁶

Injured workers have the burden of proof to establish their right to compensation under the Workers Compensation Act.¹⁷ And that burden includes proving by a

¹² *Id.*, at 50.

¹³ Davis Depo. at 14.

¹⁴ *Id.*, at 18.

¹⁵ Burget Depo. at 10.

¹⁶ Wright Depo. at 13.

¹⁷ K.S.A. 2008 Supp. 44-501(a).

preponderance of the credible evidence that their position on an issue is more probably true than not when considering the whole record.¹⁸

The undersigned finds claimant has failed to satisfy her burden of proving that she was injured at work. The form for short-term disability benefits that was signed by Dr. Bledsoe indicates claimant's hernia was not work-related. And Dr. Wilkinson specifically opined that claimant's hernia was probably related to her pregnancy. The undersigned is unaware of any medical evidence that relates claimant's hernia symptoms to her work.

In addition, in light of the numerous witnesses who contradicted claimant's testimony, the undersigned finds that claimant has failed to prove she provided respondent with timely notice of her alleged accidental injuries as required by K.S.A. 44-520. The parties did not stipulate to the date or dates of accident and, at this juncture, the evidence is vague as to whether the alleged hernia and alleged back injury occurred from a single trauma or from repetitive trauma. Accordingly, claimant has failed to prove what her date or dates of accident may be.

Based upon the above, claimant's request for benefits should be denied at this juncture of the claim.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned affirms, but for different reasons, the May 20, 2009, Order denying claimant's request for workers compensation benefits entered by Judge Barnes.

IT IS SO ORDERED.

¹⁸ K.S.A. 2008 Supp. 44-508(g).

¹⁹ K.S.A. 44-534a.

Dated this ____ day of July, 2009.

KENTON D. WIRTH
BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge